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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

71-1202

BROTHERHOOD OF PAINTERS, DECORATORS
AND PAPERHANGERS OF AMERICA, AFL-CIO
LOCAL NO. 130, PETITIONER

v

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LESLIE THACKER
2711 WOODHEAD STREET
HOUSTON, TEXAS 77006

N.L.R.B. v Fant Milling 360 U S 301, 79 S.Ct. 1179, 3 L.Ed. 1243, 1959 13

Painters District Council No. 3 Brotherhood of Painters, Decorators and Paperhangers of America AFL-CIO and Ernest L. Miller, 147 NLRB 12, 1964 12,16

Wand Corporation, 122 NLRB 499 26

F W Woolworth, 90 NLRB 289 28

Statutes and regulations:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 et seq.):

8(b)(1)(A) 5, 10, 26,28, 29, 35

8(b)(2) 5, 10, 26, 27,28, 29, 35

10 (e) 2

3(b) 22

28 U.S.C. 1655 Rule 60 (b) 4

Administrative Procedure Act (60 Stat. 237: Sec 6(d) 5

NLRB Rules and Regulations and Statements of Procedure:

29 C.F.R. 102.39 3

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO.

BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL-CIO LOCAL NO. 130, PETITIONER

v

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO Local No. 130, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit ordering enforcement of the Board's order.

OPINIONS BELOW

The opinion of the court of appeals (App.A, infra, pp. 17) is not yet officially reported. The decision and order of the Board in the unfair labor practice proceeding (App. C, infra, pp. 22-34) are reported at 170 NLRB 123. The Board's supplemental backpay order (App.D, infra pp. 35 - 37) is reported at 186 NLRB 98.

JURISDICTION

The judgment of the court of appeals (App. B, infra, pp. 18 - 19) was entered on December 23,

1971. The union's timely petition for rehearing en banc was denied on February 7, 1972 (App. B, infra pp. 18 - 19). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the National Labor Relations Board erred in denying the union the right to introduce into evidence the collective bargaining agreement between the parties, the International Constitution and to adduce additional testimony from Board witness Paul Robertson, who made an affidavit to the Board subsequent to the hearing disclaiming his prior testimony, before determining if local No. 130 committed an unfair labor practice..

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C.,Sec. 151, et seq.), is as follows: Sec. 10(e) * * * No objection that has not been urged before the Boad, its member, agent, or agency shall be considered by the court, unless the failure or neglect to urge such objection sjall be excused because of extraordinary circumstances * * * If either party shall appy to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and, that there were reasonable grounds for the failure to adduce

such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive and shall file its recommendations, if any, for the modification or setting aside of its original order * *

* * *

National Labor Relations Board Rules and Regulations Series 8, as amended (29 C.F.R. 102.39) as follows:

Sec. 102.39 Any such proceeding shall so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States, pursuant to the act of June 19, 1934 (U.S.C. title 28, secs. 723-B, 723-C)

* * *

Federal Rules of Civil Procedure for the United

States District Courts Title 28 U.S.C. #1655 as follows:

Rule 60 (b) Mistakes; inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or

suspend its operation * * *

* * *

The pertinent provisions of the Administrative Procedure Act, 60 Stat 237 (1946), are as follows:

* * *

Sec. 6 (d) Denials - Prompt notice shall be given of the denial in a whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where the denial is self explanatory, such notice shall be accompanied by a simple statement of procedural or other grounds.

STATEMENT

A. THE UNDERLYING DISPUTE

This case involves material, relevant, pertinent evidence which was not before the Board in a hearing involving an alleged violation of Sec 8(b)(1)(A) and 8 (b)(2) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, et seq.) and the efforts of the union to have this evidence admitted, testimony adduced thereon and then have the conduct, behavior and acts of the union, its officers and agents interpretated in the light thereof.

1. The collective bargaining agreement.

The complaining party is Robert E. Turner(hereinafter referred to as "Turner"), a resident of Albuquerque, New Mexico and an employee of Perfection Painting and Dry Wall, Inc., a New Mexico corporation with principal offices in Dallas, Texas (hereinafter referred to as "Perfection") Perfection had an oral contract with Shop Rite to perform certain painting work in an uncertain number of establishments located in the Houston area, in the jurisdiction of Petitioner, Brotherhood of Painters Decorators and Paperhangers of America AFL-CIO Local Union No. 130 (hereinafter referred to as Local No. 130). Turner was employed by Perfection in Albuquerque and engaged by Perfection there to do the painting on their Houston area contract, along with another employee and resident of Albuquerque, James L. Malone(hereinafter referred to as "Malone"). Perfection is signatory to a collective bargaining contract with Brotherhood of Painters, Decorators and Paperhangers of America Local No. 823 (hereinafter referred to as "Local 823") of Albuquerque, New Mexico.

Under the terms of the contract, a contractor is required to employ at least seventy five (75%) percent of the men who are residents of the area

where the work is performed or who are customarily employed a greater percentage of their time in such area.

In the collective bargaining agreement between The Houston Chapter Painting and Decorating Contractors of America and Brotherhood of Painters, Decorators and Paperhangers of America, Local Union No. 130, the following definition occurs in Article XV Section 2:

> Resident means a person who has maintained his permanent home in the above defined geographical area for a period of not less than one year or who, having had a permanent home in this area, has temporarily left with the intention of returning to this area as his home.

Both Malone and Turner worked on the jobs in the Houston area, at all times.

At no time were there eight employees on the job being performed by Perfection to justify the employment of two (2) non resident painters. At no time were there four employees on the job being performed by Perfection to justify the employment of one (1) non resident painter.

The collective bargaining agreement also includes a grievance procedure with compulsory and binding arbitration of disputes arising under the agreement Local No. 130 objected to the improper ratio of

non-resident painters. Perfection suddenly discontinued all work in the Houston area without notice. Turner, immediately, filed an unfair labor practice charge against Local No. 130. The grievance procedure was not utilized.

These two collective bargaining agreements are NOT included in evidence in the unfair labor practice hearing.

2. International Constitution.

The Constitution of the International Brotherhood of Painters and Allied Trades Sec 132 states:

> (a)When a contractor or other employer does any work outside of his home city or town and in a locality where a district council or local union exists,not less than 75% of the men employed on such work shall be residents of or employed the greater percentage of their time in such locality; any others shall be employed only from the contractor's home locality.
>
> (b) Except as otherwise specified in the General Constitution, it shall be the duty of all local unions and district councils affiliated with the Brotherhood to include in any collective bargaining agreement that they enter into with a contractor or employer the following clause:"The contractor or the employer party to this agreement, when engaged in work outside the geographical jurisdiction of the union party to this agreement, shall employ not less than

75 percent of the men employed on such work from the residents of the area where the work is performed or from among persons who are employed the greater percentage of their time in such area; any others shall be employed only from the contractor's home area."

The Brotherhood shall refuse to approve agreements which do not set forth this clause.

3. Affidavit of Paul Robertson made December 27, 1969 before an agent of the Board:

Paul Robertson, employed by Perfection at the instance of his nephew, Malone (hereinafter referred to as Robertson) states in his affidavit that SUBSEQUENT to the unfair labor practice hearing, he had been informed by Malone, that Malone and Turner had come to Houston with a grudge against the Painters Union, having had some difficulty with Local 823 in Albuquerque; that Malone and Turner had endeavored to invoke an incident with the El Paso painters union, but learned that this union did not have any money. Hence they proceeded to Houston with the "deliberate intention of setting up the same deal here with Painters Union 130 here in Houston".

Robertson then stated that he considered "such conduct so outrageous that he decided to have nothing to do with them (Malone and Turner) and

wished to provide this information to the NLRB".

This affidavit is not in evidence in the Unfair labor practice hearing.

B. THE PROCEEDINGS BEFORE THE BOARD

1. The Sec 8(b)(1)(A) and 8 (b)(2) hearing. The unfair labor practice hearing was held by the Board August 22, 1967.

Counsel for Local Union No. 130 at the hearing died.

The Board affirmed the trial examiner's finding of an unfair labor practice April 3, 1968.

No further action was taken by the Board until setting of the backpay specification hearing May 26, 1970.

Local Union No. 130 filed a Motion to Reopen the Record May 18, 1970. The Board did not answer.

Local No. 130 filed A Motion for Summary Judgment and Reconsideration May 18, 1970. No answer had been received at the start of the Backpay Specification hearing May 26, 1970 and the hearing was recessed for a long distance call to the Board in Washington whereupon a telegram was dispatched as follows:

> It is hereby ordered that respondent's motion for reconsideration be, and it

hereby is, denied lacking merit.

Local No. 130 filed a Motion to Stay Backpay Specification hearing pending the filing of Briefs and Ruling thereon on May 20, 1970. The Board made no answer.

Local No. 130 filed July 28, 1970 A Motion to Reopen Record and take testimony and/or depositions. The Board did not answer.

2. The backpay specification hearing.

On August 5, 1970 the trial examiner found Turner entitled to backpay in the amount of $12,867.36 plus interest. A three member panel of the Board affirmed November 19, 1970.

C. THE DECISION OF THE COURT OF APPEALS

The United States Court of Appeals for the Fifth Circuit placed the petition of Local No. 130 on the summary calendar and Judges Bell, Ainsworth and Godbold, on December 1, 1971 ordered enforcement of the order of the National Labor Relations Board.

REASONS FOR GRANTING THE WRIT

1. Pertinent, relevant, material evidence not in the record.

a. The collective bargaining agreement and the International Constitution are not in the unfair labor practice record. There was no testimony

adduced on either. The attorney for Local No 130 at the unfair labor practice hearing inadvertently failed to introduce these documents. He died shortly thereafter. If these two items were in the record and testimony taken on them, then Local No. 130 would NOT be found in violation of the Act, since they, as agents, for Local 823 and as a subordinate local union of the International, were required to enforce the 75-25% requirement. The inclusion of these two documents with testimony thereon, would CHANGE THE RESULT of the Board's findings.

b. The Board has heard and determined a similar case in Painters District Council No. 3 Brotherhood of Painters, Decorators and Paperhangers of America AFL-CIO and Ernest L. Miller (147 NLRB 12, 1964) which turned on the identical 75-25% contractual requirement and the Board held that the Union was not in violation of the Act. Accordingly, this would change the findings of the Board with respect to Local 130.

c. The SUBSEQUENT testimony of Paul Robertson, Board witness, is not in evidence in the unfair labor practice. His affidavit alleges fraud on the Board. Were this testimony and facts in evidence, the result would CHANGE the findings

of the Board insofar as Local Union No. 130 committing an unfair labor practice is concerned. This Court has held that evidence adduced SUBSEQUENT to an agency hearing is vital and admissible (NLRB v Fant Milling 360 U S 301, 79 S. Ct. 1179, 3 L.Ed. 1243, 1959)

2. Board's violation of the Administrative Procedure Act.

Before seeking review in the Fifth Circuit, Local Union No. 130 filed three Motions to Reopen the Record and Take Additional Testimony and the Board did not answer. The Administrative Procedure Act requires an agency to give prompt notice of a denial together with a statement setting forth the grounds. The Board did not comply.

3. Equitable Remedy

The attorney for Local No. 130 at the unfair labor practice hearing gravely erred in not introducing the collective bargaining agreement and the International Constitution into evidence at the hearing. These instruments are material, pertinent and relevant and their introduction into evidence, with testimony thereon, goes to the MERITS of the unfair labor practice charge against Local No. 130. It explains the reason for the acts, conduct and behavior of

the officers and agents of this local union. It would CHANGE THE RESULTS of the Board's findings. The Court of Appeals has not found it within their discretion to remand to the Board.

The review of an order of the National Labor Relations Board is an independent statutory proceeding rather than an appeal and is in the nature of an equity proceeding and equitable rules are applicable. (Hamilton-Brown Shoe Company v N.L.R.B. C.C.A. 8, 104 F.2d 49). Local No. 130 was required by the International Constitution and as an agent of Local 823 to enforce the 75-25% rule. It would be most offensive to good conscience and unjust to order that it should act otherwise, and this is the result, if the Board's order is to be enforced. The Board has in effect placed a fine of $12,867.36 plus interest on Local No. 130 for enforcing the contract, which it had no alternative but to honor in complying with the provisions of the International Constitution. The Board itself has heard another case in which this same 75-25% rule applies, involving the same international union and one of its subordinate unions and found that the local union had no alternative but to enforce the contractual provisions lo-

cally. This provision of the contract was bargained for by the parties and agreed upon between them. Perfection was well aware of it since they were signatory to the contract. Obviously, then, the RESULT WOULD BE DIFFERENT from that reached by the Board if the Court were to remand for the introduction of this evidence and the taking of testimony thereon. This decision and order of the Board has been reach ed through accident, inadvertence and mistake in not introducing these documents at the unfair labor practice hearing. The board didn't do its homework well either when inquiry was not made to establish the terms of the collective bargaining agreement between the parties and what effect it might have on the acts, conduct and behavior of the local union and its agents. Further, Robertson, the Board's witness, has gone before the Board and made his affidavit stating his subsequent discovery of the fraud perpetrated by Turner and Malone on the Board to extract money from Local No. 130 for their personal benefit.

Local No. 130 appeals to this Court and its inherent powers of equity. Local No. 130 comes with clean hands. Local No. 130's attorney at the unfair labor practice hearing is guilty of

inadvertence and mistake. This is the human factor of error. It would be unconscionable for Local No. 130 to be fined for enforcing a contract it was compelled to enforce as a subordinate local of the International and that the Board has already concurred in(Painters District Council No. 3 Brotherhood of Painters, Decorators and Paperhangers of America AFL-CIO and Ernest L. Miller, supra 147 NLRB 12

This would violate the constitutional rights of Local No. 130.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted

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713-524-5794
ATTORNEY FOR
BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA AFL-CIO LOCAL NO. 130

March 3, 1972

Appendix A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30346

Summary Calendar*

BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL-CIO LOCAL NO. 130,

Petitioners-Cross Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent-Cross Petitioner.

Petition for Review Cross Application for Enforcement of an Order of the National Labor Relations Board (Texas Case)

(December 1, 1971)

Before BELL, AINSWORTH, and GODBOLD, Circuit Judges.

PER CURIAM: ENFORCED. See Local Rule 21.[1]

*Rule 18, 5 Cir.; See *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al.*, 5 Cir. 1970, 431 F.2d 409.

[1]See *NLRB v. Amalgamated Clothing Workers of America*, 5 Cir. 1970, 430 F.2d 966.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NO. 30346

BROTHERHOOD OF PAINTERS, DECORATORS
AND PAPERHANGERS OF AMERICA, AFL-CIO
LOCAL NO. 130, PETITIONER

v

NATIONAL LABOR RELATIONS BOARD
RESPONDENT

JUDGMENT

Before: Bell, Ainsworth, and Godbold, Circuit Judges

This cause was submitted to this Court on a Petition to review, and on a cross-application for enforcement of, an order of the national Labor Relations Board dated April 3, 1968, and a supplemental Decision and order on November 19,1970, against Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO Local No. 130, its officers, agents, and representatives. The Court having carefully considered the briefs and transcript of record filed in this cause determined the case appropriate for summary disposition without oral argument. On December 1,1971, the Court handed down its opinion denying the petition to review and granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered and ad-

judged by the United States Court of Appeals for the Fifth Circuit that the said orders of the National Labor Relations Board in said proceeding be enforced, and that Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO Local No. 130, its officers, agents, and representatives, abide by and perform the directions of the Board in said Orders contained.

For the Court:
Edward W. Wadsworth,
Clerk
By Donna Brady
Deputy Clerk

Entered December 23, 1971

A true copy:
Test: Edward W. Wadsworth, Clerk
United States Court of Appeals
for the Fifth Circuit
By: Donna Brady, Deputy Clerk

Appendix B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30346

BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL-CIO LOCAL NO. 130,
Petitioner-Cross Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent-Cross Petitioner.

Petition for Review Cross Application for Enforcement of an Order of the National Labor Relations Board (Texas Case)

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Dec. 1, 1971, 5 Cir., 1971, ____ F.2d ____).

(February 7, 1972)

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

2 PAINTERS, DECORATORS, ETC. v. N.L.R.B.

PER CURIAM: The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also DENIED.

For the Court:
Edward W. Wadsworth, Clerk
By: Donna Brady,
Deputy Clerk

Dated February 7, 1972
A true copy:
Test: Edward W. Wadsworth, Clerk
United States Court of Appeals
for the Fifth Circuit
By: Donna Brady, Deputy Clerk

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

170 NLRB 123

APPENDIX C

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE 23 CB 761

BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL-CIO LOCAL NO. 130 (PERFECTION PAINTING AND DRY WALL, INC.)

and

ROBERT E. TURNER, AN INDIVIDUAL

DECISION AND ORDER

On November 1, 1967, Trial Examiner William Seagle issued his Decision in the above-entitled proceeding, finding that the Respondent Union had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent Union filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no

prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and hereby aopts the findings,[1] conclusions, and recommendations of the Trial Examiner, except as modified herein.

Shop Rite Foods, Inc. hereinafter called Shop Rite, operates a chain of food stores in New Mexico, Oklahoma, and Texas. Early in February 1967, Shop Rite concluded an oral agreement with Perfection Painting and Dry Wall, Inc., a painting contractor hereinafter called Perfection, whereby

[1] The Trial Examiner found that Perfection Painting and Dry Wall, Inc., a New Mexico Corporation, maintains its principal office in Dallas, Texas, where it is engaged in the paint contracting business. He did not find, nor does the record show, sufficient facts to establish that this firm meets the Board's discretionary jurisdictional standards. However, the record shows that the firm does business in the States of Texas and New Mexico. Moreover it has been alleged that in the course of the labor dispute involved in this case the Respondent Union directed pressure against representatives of Perfection and representatives of Shop Rite Foods Inc., which had engaged Perfection to paint its stores in the Houston Bay area, in an effort to deny such painting work to Perfection employees. In these circumstances, and as Perfection otherwise meets the jurisdictional requirements imposed by the Act, we find that it will effectuate the purposes of the Act to assert jurisdiction.

the latter was to perform painting work in some 16 Shop Rite Stores in the Houston Bay area. Perfection had previously done painting for Shop Rite in other localities. Pursuant to this agreement, Perfection began work in the Houston Bay area on February 7, 1967. At the outset, James L. Malone was in charge of the Perfection work. Prior to the commencement of the job, Malone called the Respondent Union in an effort to clear Robert E. Turner, who had previously been employed by Perfection in El Paso, for work in the Houston Bay area. While this matter was pending, Perfection put Turner to work. Approxmately, one week after the painting had begun, E.L. Brimberry, a business representative of the Respondent Union, summoned Malone to his office and informed him that the continued employment of Turner on the Shop Rite jobs was unacceptable to him, and that if it continued, he would picket the jobs. Thereafter, Paul E. Robertson was employed by Perfection as job superintendent, replacing Malone who stayed on the job as a painter. Robertson requested that the Union issue referral slips and overtime permits for Turner and Malone. Brimberry refused and threatened to run Perfection out of the Houston Bay area if Perfection did not fire both Turner and Malone, having previously told Robertson

that this was "his way of protecting his men from out-of-town painters." Robertson did not comply. On February 20, Brimberry telephoned Robertson several times and repeatedly threatened to picket Perfection jobs unless the objectionable employees were fired. The next day Brimberry made good his threats by causing one of the Shop Rite stores, in which painting was in progress, to be picketed.

As a direct result of this pressure brought to bear by the Respondent Union against Perfection, Shop Rite discontinued the scheduling of painting at the remaining stores which had previously been awarded to Perfection, and as a result, the employment relationship between Perfection and Turner was prematurely terminated.[2]

[2] At the hearing C.A.West, vice president of Shop Rite and its chief executive in the Houston Bay area, testified that he called Malone on February 23, 1967, and told him to complete the Shop Rite jobs he had started and that there would be no further work in the area. He assigned as his reason for deciding to terminate the agreement with Perfection: ".. all the harrassment and the problems that we had, the picket and all of the trouble that was caused...by Malone and the people that he couldn't get along with." As to this testimony Trial Examiner concluded only that West was mistaken in his belief that he revealed his intentions to Malone immediately after the picketing. He does not discredit the reasons advanced by West for deciding to terminate the painting contract. In these circumstances and in the absence of any contradictory

For the reasons stated by the Trial Examiner, we find that the Respondent Union, by its picketing and by the conduct of its business representative Brimberry, as described above and as more fully described in the Trial Examiner's Decision, sought to deny Robert E. Turner employment on painting jobs in th e Houston Bay area, so that greater work opportunities would become available to members of the REspondent Union. In agreement with the Trial Examiner, we find that, by this conduct, the REspondent Union violated Section 8(b)(1)(A) of the Act.

The Respondent Union does not except to the above-stated findings of fact or legal conclusions, but only to the further holding of the Trial Examiner, that, by such conduct, the Union caused Shop Rite to discriminate with respect to Turner's tenure of employment in violation of Section 8(b)(2) of the Act. We find it unnecessary to pass upon the correctness of this holding of the Trial Examiner,[3]

2 (continued)
evidence, we credit the reasons given by West for terminating the Shop Rite contract with Perfection.

3 But see Member Fanning's dissenting opinion in Wand Corporation, 122 NLRB 499, for his view, to which he adheres, that secondary employer does not violate Section 8(a)(3) by cancelling a subcontract because of the nonunion status of the subcontractor's employees.

or upon the contentions related thereto raised by the Respondent Union, for we find that by such conduct the Union attempted to cause and caused Perfection to terminate Turner's employment in the Houston Bay area. As the complaint herein alleges that the Union violated Section 8(b)(2) of the Act by causing or attempting to cause Perfection, as well as Shop Rite, to discharge Turner, and as the recordamply supports a finding that the Union brought pressure directly against Perfection in an attempt to cause Perfection to discharge Turner,[4] we find that by its conduct, as described above, the Respondent Union violated Section 8(b)(2) of the Act. As a finding that the Respondent Union also violated Section 8(b)(2) by bringing pressure against Shop Rite would not cause us to alter our remedy, we need not pass upon the Trial Examiner's finding of a violation of Section 8(b)(2) based on such pressure.

4 As the Trial Examiner specifically found facts demonstrating that Brimberry brought direct pressure against Malone and Robertson, as described above, and as these findings are amply supported by the record, we find no reason for, nor do we adopt, the Trial Examiner's subsequent inconsistent finding that "there was no direct approach by Brimberry to any representative of Perfection."

The Remedy

As we have found that the Respondent violated Section 8(b)(1)(A) and (2) of the Act, we shall require that it cease and desist from the practices in which it has engaged, and from restraining or coercing any of the employees of Perfection in the exercise of the rights guaranteed in Section 7 of the Act.

The record shows that as a result of the pressure brought to bear by the Respondent Union against Perfection, Shop Rite discontinued the scheduling of painting jobs which had previously been awarded to Perfection, and that as a result, the employment relationship between Perfection and Robert E. Turner was prematurely terminated. Therefore, we shall require that the Respondent Union make Turner whole for any loss of pay he may have suffered by reason of its discriminatory conduct. Loss of pay shall be determined in accordance with the formula prescribed in F.W.Woolworth, 90 NLRB 289, including interest thereon at 6 percent per annum in accordance with Isis Plumbing & Heating Co., 138 NLRB 716. We shall also require that the Respondent Union notify Perfection and Shop Rite that it has no objection to Perfection employing Turner on jobs in Houston Bay area.

Conclusions of Law

1. Perfection Painting and Dry Wall,Inc., is an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO Local No. 130, is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening to secure the discharge of Turner and to run Perfection out of the Houston Bay area, by refusing to issue referral slips or overtime permits to Perfection employees, by threatening to picket the Shop Rite stores, and by actually picketing one of them, in order to force the discharge of Perfection employees in an attempt to secure their jobs for members of Local 130, the Respondent restrained and coerced the employees of Perfection in the exercise of the rights guaranteed to them in Section 7 of the Act, and has thereby committed unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) of the Act. By this same conduct, the Respondent has also committed unfair labor practice affectin g commerce within the meaning of Section 8(b)(2) of the Act.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent,

Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO, Local 130, its officers, representatives, agents, successors and assigns shall:

1. Cease and desist from:

(a) Threatening to secure the discharge of any of the employees of Perfection Paintin g and Dry Wall Inc., or to run Perfection out of the Houston Bay area.

(b) Refusing to issue referral slips or overtime permits to the employees of Perfection.

(c) Picketing or threatening to picket any job under contract to Perfection in order to force Perfection out of the Houston Bay area or to secure the jobs of its employees for members of Local 130.

(d) Encouraging membership in Local 130, and discouraging membership in other Painters' Union locals, by discriminating in any manner against employees who are not members of Local 130 in regard to their hire or tenure of employment or any other term or condition of their employment.

(e) In any like or related manner, restraining or coercing the employees of Perfection in the exercise of the rights guaranteed to them in Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Make Robert E. Turner whole for any loss of pay he may have suffered by reason of the Respondent's discrimination against him in the manner and to the extent set forth in the section of this Decision entitled "The Remedy".

(b) Notify Perfection and Shop Rite Foods Inc., that it has no objection to Perfection employing Turner on jobs in the Houston Bay area.

(c) Post in conspicuous places in its business offices in Houston, and in other places where notices to members are customarily posted, copies of the attached notice marked "Appendix".[5] Copies of said notice, on forms provided by the Regional Director for Region 23, shall, after being duly signed by an official representative of the Respondent, be posted by the Respondent immediately upon receipt thereof and be main tained by it for 60 consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Mail to the Regional Director for Region 23 signed copies of the aforementioned notice for posting by Perfection, if it be willing, in places

[5] In the event that this Order is enforced by a decree of a UnitedStates Court of Appeals, there shall be su bstituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals, Enforcing an Order."

where notices to employees are customarily posted. Copies of said notice, on forms to be furnished by the Regional Director for Region 23, shall, after being signed by the Respondent, as indicated, be forthwith returned to the Regional Director for disposition by him.

(e) Notify the Regional Director for Region 23, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington,D.C. April 3, 1968

John H. Fanning Member

Howard Jenkins,Jr.,Member

Sam Zagoria Member

NOTICE TO ALL OUR OFFICERS AND AGENTS AND TO ALL MEMBERS UNDER THE JURSIDICTION OF BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL-CIO LOCAL NO. 130

AND TO ALL EMPLOYEES OF

PERFECTION PAINTING AND DRY WALL, INC

PURSUANT TO

A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We will not threaten to secure the discharge of any of the employees of Perfection Painting and Dry Wall, Inc., or to run them out of the Houston Bay area.

We will not refuse to issue referral slips or overtime permits to employees of Perfection at the request of the company .

We will not picket or threaten to picket any job under contract to Perfection in order to force Perfection out of the Houston Bay area or to secure the jobs of its employees for members of Local 130.

We will not encourage membership in our local, or discourage membership in other Painters' Union locals by discriminating in any manner against employees who are not members of our local in regard to their hire or tenure of employment or any other term or condition of their employment.

We will not, in any like or related manner, restrain or coerce the employees of Perfection in the exercise of the rights guaranteed to them in Section 7 of the Act.

We will make Robert E. Turner whole for any loss of pay he may have suffered by reason of our discrimination against him.

We will notify Perfection and Shop Rite Foods,Inc., that we have no objection to Perfection employing Turner in the Houston Bay area.

BROTHERHOOD OF PAINTERS,DECORATORS AND PAPERHANGERS OF AMERICA, AFL-CIO LOCAL NO.130

Dated_____By_____
Representative Title

This notice must remain posted for 60 consecutive days from date of posting, and must not be altered defaced, or covered by any other material. Employees may communicate directly with the Board's Regional Office, 6617 Federal Office Building,515 Rusk Avenue,Houston, Texas 77002(Tel.No.228-0611), if they have any question concerning this notice or compoiance with its provision.

186 NLRB No. 98 APPENDIX D

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE 23 CB 761

BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL-CIO LOCAL NO. 130 (PERFECTION PAINTING AND DRY WALL, INC.)

and

ROBERT E. TURNER, AN INDIVIDUAL

SUPPLEMENTAL DECISION AND ORDER

On April 3, 1968, the National Labor Relations Board issued a Decision and Order, finding inter alia, that Respondent Union sought to deny employment to and attempted to cause the discharge of Robert E. Turner in violation of Section 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act, as amended; and that thereby, Respondent Union caused the employment relationship between Perfection Painting and Dry Wall, Inc., to be prematurely terminated. The Board's order required that Respondent Union make Turner whole for any loss of pay he may have suffered by reason of its discriminatory conduct (170 NLRB No. 123)

On April 7, 1970, the Regional Director for Region 23 issued and served on the parties a Backpay Specification and Notice of Hearing. On May 15, 1970, Respondent Union filed an Answer. On

On May 19, 1970, Respondent Union filed a Motion to Reopen the Record and a Motion for Summary Judgment and REconsideration. After these motions had been denied by the Board, and pursuant to notice, a hearing was held before Trial Examiner Gordon J. Myatt on May 26,1970, for the purpose of determining Respondent Union's backpay obligation to Turner.

On August 5,1970, the Trial Examiner issued the attached Supplemental Decision in which he found the discriminatee herein to be entitled to backpay in the amount specified. Thereafter, Respondent Union filed exceptions to the Trial Examiner's Supplemental Decision.[2]

[2] On August 25,1970,in a Motion to Reopen Record and take Testimony and/or Depositions with the Board,Respondent Union requested the Board to "take testimony and/or Deposition of Mr. and Mrs Paul Robertson and possibly one or two other witnesses appearing in the original hearing".It is alleged in support of the motion that "newly discovered evidence . . will prove intrinisic and extrinsic misrepresentation and/or misconduct of the adverse party,"and that Respondent Union "will be denied due process without the opportunity to have said evidence in the record and duly considered as to whether an unfair labor practic was committed."After due consideration,we find nothing in this motion which would require that the unfair labor practice hearing be reopened. Accordingly, said motion is hereby denied.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the Supplemental Hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the entire record in this case, including the Supplemental Decision and the exceptions, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10)c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that REspondent Union Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO Local No. 130, its officers, agents and representatives, shall pay to Robert E. Turner, the amount set forth in the attached Trial Examiner's Supplemental Decision.

Dated, Washington D.C. November 19,1970

Edward B.Miller, Chairman

John H. Fanning, Member

Howard Jenkins,Jr.,Member
NATIONAL LABOR RELATIONS BOARD

SUPREME COURT, U. S.
Supreme Court, U. S.
FILED
MAY 10 1972
MICHAEL RODAK, JR., CLERK

No. 71-1202

In the Supreme Court of the United States

OCTOBER TERM, 1971

BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL-CIO LOCAL NO. 130, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530

PETER G. NASH,
General Counsel,
National Labor Relations Board,
Washington, D.C. 20570

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1202

BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL-CIO LOCAL NO. 130, PETITIONER

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1. In the initial unfair labor practice proceeding, the Board found that the Union had committed various unfair labor practices, including causing or attempting to cause Perfection Painting and Dry Wall, Inc. to discharge Robert E. Turner, a non-member of the Union, from a job in Houston, Texas, so that greater work opportunities would be available for Union members (Pet. App. 26, 29). The Board's

order—issued on April 3, 1968—required the Union, *inter alia*, to make Turner "whole for any loss of pay he may have suffered" by reason of its discriminatory conduct (Pet. App. 31).

On April 7, 1970, the Regional Director issued and served on the parties a Backpay Specification and Notice of Hearing (Pet. App. 35). After filing its answer to the Backpay Specification, the Union filed a series of motions with the Board seeking to reopen the record in the initial proceeding for the introduction of additional evidence and to stay the backpay hearing (Pet. App. 35-36). The evidence the Union sought to introduce was a contract between Perfection Painting and Local No. 823 of the Painters Union, which contained a clause that required Perfection—when working outside the Albuquerque, New Mexico, area—to employ 75 percent of its painters from the area in which the work was being performed. The contract also established a grievance procedure. The Union claimed that, since Turner did not follow the contract grievance procedure, he was estopped from receiving any protection under the National Labor Relations Act. (R. 41-49.)[1] The Board denied the Union's motions (R. 49-50, 53).[2]

2. In the subsequent backpay hearing, the Union introduced into evidence an affidavit (R. 268-271) of

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[1] "R." refers to the appendix in the court below.

[2] One of the Board's rulings is not contained in the appendix: On May 26, 1970, the Board, by telegram, denied "as lacking merit" the Union's motions to reopen the record, for summary judgment, and to stay the backpay hearing.

Paul E. Robertson, who had acted as job superintendent during the work in Houston, for the purpose of showing that Turner's earnings on the Houston job, had he not been unlawfully discharged, would have been less than the amount in the backpay specification (R. 244-247). The Trial Examiner, noting that the Union neither presented Robertson as a witness nor explained why he was unavailable to testify, concluded that the affidavit was without probative value (R. 66). He recommended that Turner be awarded backpay of $12,867.36, plus interest (R. 68).

The Union, although excepting to the Trial Examiner's recommendation, did not contest his ruling on the Robertson affidavit; on the contrary, it asserted that Robertson's testimony was "unnecessary" (R. 73). However, the Union subsequently moved the Board to reopen the hearing to take the testimony or deposition of Mr. and Mrs. Robertson and "possibly one or two other witnesses," on the ground that such evidence, which was newly discovered, "will prove intrinsic and extrinsic misrepresentation and/or misconduct of the adverse party" (R. 54). The Board denied the motion, and ordered the Union to pay the backpay recommended by the Examiner (Pet. App. 36, n. 2, 37). The court of appeals summarily enforced the Board's orders (Pet. App. 17).

3. The only issue raised by the petition is whether the Board and the court of appeals abused their discretion in refusing to reopen the record in this case to permit the Union to introduce the contract between Perfection and Local No. 823, and evidence

of alleged "fraud" by Turner (Pet. 12-13). This issue, which turns on the particular facts of the case, does not warrant review by this Court. In any event, the Board and the court of appeals were reasonable in declining to reopen the record.

a) Petitioner sought to introduce the contract between Perfection and Local No. 823 for the purpose of showing that it contained a clause which required Perfection to employ 75 percent of its painters from the area in which the work was being performed, and that Turner was discharged in conformity with this clause and not because of his non-membership in the Union. Although the Union had knowledge of this contract at the initial unfair labor practice hearing (R. 102), it did not bring it to the Board's attention until 2½ years later; and, then, the Union merely contended that a Board remedy was barred because of Turner's failure to exhaust the grievance procedure of the contract (*supra*, p. 2). In these circumstances, the Board and the court of appeals were justified in refusing to reopen the record to consider the Union's additional, belated contract defense. *Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U.S. 100, 104; *National Labor Relations Board* v. *Victor Otlans Roofing Co.*, 445 F. 2d 299, 300 (C.A. 9).

Moreover, the contract is not material, for the evidence warrants the Board's finding that the Union secured Turner's discharge not because area residents were out of work, but because Turner was not a

member of the Union.[3] The Union never mentioned the Local No. 823 contract when carrying its complaints about Turner to Perfection, and, in its correspondence with Perfection, the Union never demanded that 75 percent of Perfection's work force be made up of Houston residents (R. 303, 306, 311, 312, 313).

b) Petitioner sought to introduce the testimony of Robertson on the ground that his affidavit alleges (see R. 270) that Turner perpetrated the incident in Houston in order to exact money from the Union. But when the Union presented that affidavit to the Examiner, it merely contended that it showed that the Board's backpay computation was excessive. Although the Union thereafter moved the Board to reopen the record to take the testimony of Robertson and others, it made no reference to the portion of the affidavit now relied on, and did not otherwise particularize the nature of the misconduct it hoped to establish. (*supra*, p. 3.) Moreover, the Union did not mention Robertson's affidavit or Turner's alleged misconduct in its brief or reply brief in the court of appeals. In these circumstances, the Board and the court of appeals were also justified in refusing to reopen the record to consider the Union's belated

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[3] *Painters District Council No. 3, Brotherhood of Painters*, 147 NLRB 79, on which petitioner relies, is distinguishable. There, the Board simply held that a contract clause giving preference in hiring to local residents was not unlawful on its face, since it did not turn on union membership considerations. Such a clause cannot be used to immunize union action which does in fact turn on those considerations.

"misconduct" allegation. See *National Labor Relations Board* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563, 569-570.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

MAY 1972.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 465181-720

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MAY 18 1972

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-1202

BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL-CIO LOCAL NO. 130, PETITIONER

v

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM FOR THE BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL-CIO LOCAL NO. 130

LESLIE THACKER
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COUNSEL FOR PETITIONER,
BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL-CIO LOCAL NO. 130

May 13, 1972

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-1202

BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL-CIO LOCAL NO. 130, PETITIONER

v

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM FOR THE BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL-CIO LOCAL NO. 130

This dispute involves Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO Local No. 130 (hereinafter referred to as Local Union No. 130) and Turner, an employee of Perfection Painting and Dry Wall, Inc, (hereinafter referred to as Perfection), a New Mexico corporation having a contract with Brotherhood of Painters, Decorators and Paperhangers of America, Local Union No. 823 (hereinafter referred to as Local No. 823). Both subordinate local unions are members of International Brotherhood of Painters and

Allied Trades.

The Constitution of the International Brotherhood of Painters and Allied Trades requires every subordinate local union have a clause in their collective bargaining contract that:

> when a contractor or other employer does any work outside of his home city or town, not less than 75% of the men employed on such work shall be residents of or employed the greater percentage of their time in such locality; any others shall be employed only from the contractor's home locality

Perfection was signatory to such a contract with Local Union No. 823. Local Union No. 130, of course, had such a clause in its contract. Local Union No. 130 had no alternative but to enforce the contract and to comply with the Constitution of its International. This clause is clearly non discriminatory as to race, color, creed, sex, national origin, membership or non-membership in any union. Texas is a right to work state.

By contract, Local Union No. 130 is required to dispatch to the contractor, in the order the applicant signs the out of work list, any man or woman, union member or non union member, and the contractor has the right to accept or reject. Local Union No. 130 processes grievances for non union members as well as union members.

This contract provision was not introduced into evidence at the unfair labor practice hearing. Its admission has been urged by Local Union No. 130 at the Board level, repeatedly, and again before the Court of Appeals. (Appendix 41; 42; 50)

No action against Local Union No. 130 was taken from April 3, 1968, when the Board affirmed the Trial Examiner's finding of an unfair labor practice, until May 1970, when a backpay specification hearing was set. Accordingly, Local Union No. 130 was not forewarned or alerted to the necessity of further defending its position. The error, negligence and inadvertence of counsel in not introducing this contract provision was not transferred or referrable to the union. Local Union No. 130 had clean hands as it was adhering to the contract and observing the requirements of its International's Constitution. True, more than a year had elapsed under Rule 60(b) of Federal Rules of Civil Procedure. But this Rule also acts to mitigate the harsh impact of the calendar as a result of counsel's neglect and other circuits have held it is available in order to accomplish justice (Link v Wabash Railroad Company 370 U.S. 626,632, 82 S. Ct. 1386, 8 L.Ed.2 2734 (1962); L. P. Stewart Inc v Joseph H. Matthews 329 F.2d 234, March 9, 1964 C.A. District of Columbia)

A series of Motions were then filed with the Board. The first two were filed May 18, 1970, setting out the contract and reciting the 75% requirement and the grievance procedure with compulsory arbitration in case of disputes. These two Motions to the Board were NEVER answered. The Regional Director did answer a request for a stay of the backpay specification hearing in the prayer, by denying the stay (Appendix 49) The Regional Director, of course, had no jurisdiction to answer the prayer to reopen the record or for reconsideration.

Then on May 20, 1970, Local Union No. 130 filed an additional Motion to Stay Backpay Specification Hearing pending filing of briefs and Ruling on Motion to Reopen Record and Motion for Summary Judgment and Reconsideration (Appendix 50). No answer was received from the Board at hearing time on May 26, 1970 and Local Union No. 130 demanded that the Trial Examiner obtain answer from the Board, whereupon a telegram was dispatched saying Motion denied as "lacking merit" (Appendix 53) It is rare that a Court of law or equity denies a petitioner the right to file a brief and set out position, but the Board would not even permit this.

Then on July 28, 1970, Local Union No. 130 again filed a Motion to Reopen Record and take Testimony and/or Depositions, setting out the newly discovered evidence in the affidavit taken from Paul Robertson by a Board agent, alleging fraud on the Board. This motion was referred to and denied in the Board decision of November 19, 1970, BY FOOTNOTE, when it issued its supplemental decision and order affirming the Trial Examiner's decision. (Appendix 54; 76)

Paul Robertson was superintendent for Perfection and a star witness for the Board at the unfair labor practice hearing. On December 29, 1969, he made the following affidavit before the Board:

> . . . . I have not been induced to make this affidavit by Painters Local 130 or anyone else. I have offered to provide this information to the National Labor Relations Board because I have learned from my nephew, Malone, since the trial involving these people, that Malone and Turner had been carrying a grudge against the Painters Union because of some difficulties with Painters Local 823 in Albuquerque, and that they had gone to El Paso and tried to pull a deal with Local 902 there, using the same plan that they pulled here in Houston, but when they learned that the local out there did not have any money, they came to Houston with the deliberate intention of setting up the same deal here with Painters Union 130 here in

> Houston. This is something that I learned from my nephew since the trial. He told me this with his own mouth. I considered such conduct so outrageous that I decided to have nothing further to do with them and I wish now to provide this information to the National Labor Relations Board. I am perfectly willing to talk to any agent of the NLRB about this, or to testify.

When this came to the attention of Local Union No. 130, Motion was made to the Board to have this evidence in the record and adduce testimony thereon. Relief was again sought from the Court of Appeals. Robertson's statement shows an unconsciounable plan and scheme on the part of Turner, the Malone to provoke an incident with Local Union No. 130 in order to recover money damages. Both Turner and Malone knew the 75% resident requirement before they came to Houston; they were Albuquerque residents.

The Board flagrantly failed and refused to follow the Administrative Procedure Act 5 U.S.C.A. #555(e). This Court and other circuits have permitted, under Rule 60(b) of Federal Rules of Civil Procedure, the adducing of additional evidence under these circumstances where the result would be changed in the

light thereof. (N.L.R.B. v Fant Milling 360 U.S. 301 79 S.Ct.1179, 3 L.Ed. 1243, 1959; Hazel-Atlas Glass Company v Hartford Empire Company 322 U.S. 238, 64 S. Ct. 997, 88 L.Ed. 1250; John O. England v Morgan J. Doyle 281 F.2d 304 U.C.A (9) 8/11/60; Raymond Rahauer v Leopold Friedman 306 F.2d 933 U.C.A (9) 7/25/62

Although the Solicitor General represents to this Court otherwise, Local Union No. 130 requested of the Court of Appeals the opportunity to introduce the contract and the 75% rule required by the International of all its subordinate locals, as well as Robertson's affidavit, alleging fraud on the Board and to adduce testimony thereon. Turner and Malone worked on the job at all times, but there were never a sufficient number of resident painters to justify the employment of Turner and/or Malone under the 75% requirement.

In the backpay specification hearing the union was not permitted to submit any evidence or adduce any testimony relevant to the unfair labor practice, the trial examiner limiting evidence to that having DIRECT REFERENCE to the "discriminatee's interim earnings or the sum he may or may not be entitled to in terms of the backpay specification" (Transcript 80).

Other circuits have permitted the introduction of additional evidence, including contracts and subsequently adduced evidence, for evaluation and appraisal of behavior, acts and conduct for a full and complete record before a reviewing court determines whether or not there is substantial evidence in the record as a whole to support an unfair labor practice finding.

It is beyond the comprehension of this Petitioner that its rights of due process will be foreclosed by this Court without a full record before it, in an equitable proceeding.

The Petition for a writ of certiorari should be affirmed.

Respectfully submitted,

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COUNSEL FOR PETITIONER,
BROTHERHOOD OF PAINTERS,
DECORATORS AND PAPER-
HANGERS OF AMERICA, AFL-
CIO LOCAL NO. 130

May 13, 1972